Congressional Research Service

Memorandum May 9, 2005

TO: Hon. Frank R. Wolf
Attention: Courtney Schlieter

FROM: M. Maureen Murphy
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American Law Division

SUBJECT: Presidential Authority with Respect to Indian Gaming

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This responds to your request that our office provide you with a brief list of possible tools that the President might employ to curb "reservation shopping," that is, locating Indian gaming on off-reservation, possibly distant, sites that are more conducive to gaming than traditional reservation lands.[1] Specifically, you are interested in preventing recognition of new Indian tribes under the administrative acknowledgment process under 25 C.F.R. Part 83; limiting trust acquisition of land to be used for gaming; and curtailing the extension of casino gaming. We will address each in turn and indicate any Presidential authority or agency discretionary authority that may be used to pursue these goals.

Options to achieve the above results include: (1) withdrawing authority to recognize new tribes; (2) directing that regulations be issued for land acquisition for gaming purposes and that regulations be rescinded for issuing procedures for class III gaming in the absence of a tribal-state compact; and (3) directing the Attorney General to take certain steps to enforce laws against illegal Indian gaming operations.

Recognition of New Tribes. The Department of the Interior (DOI) has a regulation, 25 C.F.R., Part 83, detailing an administrative process by which an American Indian group may establish that it exists as an Indian tribe. Rather than being the result of a special delegation from Congress to the Secretary of the Interior (SOI) to make determinations as to whether or not groups satisfy specified criteria requiring recognition as Indian tribes, 25 C.F.R., Part 83, is based on various statutes delegating authority to the DOI.[2] It, thus, might be possible

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[1] *See* Fox Butterfield, "Indians' Wish List: Big-City Sites for Casinos," New York *Times* A-1, col. 4 (April 8, 2005).

[2] 5 U.S.C. § 301 (authorizing the head of each Executive department to prescribe regulations); 25 U.S.C. § 2 (authorizing the Commissioner of Indian Affairs, under the direction of SOI, "agreeably (continued...)

for the President to issue a directive withdrawing from DOI the power to recognize groups as Indian tribes. Were that to occur, however, groups seeking to establish themselves as Indian tribes and eligible for benefits and services provided to federal Indian tribes would likely turn to the federal courts or Congress to obtain federal recognition.[3]

Limiting Trust Acquisition of Land for gaming. Unlike the tribal acknowledgment process, the trust land acquisition process rests on authority specifically delegated to DOI by statute.[4] There are general Indian land acquisition regulations.[5] There is, however, no specific DOI regulation detailing a procedure that must be satisfied before land may be taken into trust for gaming purposes. Although DOI issued a proposal to this effect on September 14, 2000,[6] and reopened the comment period on December 27, 2001,[7] no final regulations

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[2] (...continued)
to such regulations as the President may prescribe, [to] have the management of all Indian affairs and of all matters arising out of Indian relations"); and, 25 U.S.C. § 9 (authorizing the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs....").

[3] The federal courts have had a role in determining whether a group qualifies as an Indian tribe for a particular purpose. For example, in 1877, in *United States v. Joseph,* 94 U.S. 614, the Supreme Court determined that the Pueblos were not an Indian tribe for purposes of the Indian liquor laws. Later, their status was reconsidered, and the Pueblos were held to be an Indian tribe and their lands protected under a federal law that prohibited the sale or alienation of Indian land without federal approval. *United States v. Candelaria*, 231 U.S. 28 (1913). Groups have sought court orders to compel DOI to process their applications for acknowledgment in a more timely fashion. See, e.g., *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30 (D.D.C. 2000). That approach may have been precluded by a ruling in *Mashpee Wapanoag Tribal Council, Inc. v. Norton*, 336 F. 3d 1094 (D.C. Cir. 2003), in favor of DOI. The court found that competing agency priorities and limited resources must be considered in claims that the length of time it takes to process an acknowledgment petition is unreasonable within the meaning of the Administrative Procedure Act. 5 U.S.C. § 555(b). Other groups have tried the indirect approach of identifying a statute that requires that the plaintiff be an Indian tribe and suing under that statute in an attempt to force a court to determine whether that particular statute's definition of "Indian tribe" has been met. In *Golden Hill Paugusset Tribe of Indians v. Weicker*, 39 F. 3d 51 (2d Cir. 1994), involving a land claim by a group asserting that it is an Indian tribe and its land had been alienated without federal approval in violation of 25 U.S.C. § 177, the court remanded the case to the district court with instructions to enjoin the litigation for 18 months pending DOI resolution of the group's acknowledgment petition. In *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D. N.Y. 2003), the court temporarily enjoined a state-recognized tribe's construction of a gaming operation for 18 months pending DOI action on an acknowledgment petition. Both courts saw DOI's jurisdiction over the question as primary and their court's jurisdiction as secondary and seemed to have indicated that the court would take up the issue of tribal existence in the absence of a ruling by DOI.

[4] The major statutory authority is section 5 of the Indian Reorganization Act of 1934, codified at 25 C.F.R. § 465. It authorizes SOI "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."

[5] 25 C.F.R., Part 151.

[6] 65 *Fed. Reg.* 55471 (September 14, 2000). An earlier proposal, 57 *Fed. Reg.* 51487 (July 15, (continued...)

have been issued. Should DOI decide to revisit the issue of amending its Indian land acquisition regulations and issue proposed regulations for land acquisition for gaming, it is possible that provisions could be included in such regulations that would have the effect of modifying the land acquisition process to such an extent that the overall effect would be to limit acquisitions for gaming purposes, including off-reservation acquisitions. Although it would seem that even if the President has no direct authority to modify or promulgate such regulations, he would be able to provide DOI with policy guidance to move in that direction.

Curtailing the Extension of Casino Gaming. Although SOI, rather than the President, has been delegated authority under the Indian Gaming Regulatory Act (IGRA),[8] that authority is limited. For class III gaming to occur, there must be a tribal-state compact and SOI has authority to approve such compacts.[9] Approval may be withheld only for three specified reasons,[10] and the compact is deemed approved if SOI does not act within 45 days.[11]

One way that might be available to SOI to curtail further casino gaming is to rescind regulations that the SOI has issued authorizing the promulgation of procedures for class III gaming when a State raises an Eleventh Amendment sovereign immunity defense to a suit brought by a tribe to compel negotiation of a tribal-state compact. These regulations, 25 C.F.R. Part 291, have not yet been used. Without the regulations, there would be no possibility of class III gaming in the absence of a tribal-state compact.

Other options that might be available to the President include instructing the Department of Justice to review all casino gaming on Indian lands and, to the extent permitted under applicable statutes, bring federal prosecutions or seek judicial injunctions against any gaming being operated in violation of IGRA or state law.

We hope this information is helpful to you and that you will call upon our office should you need further assistance.

M. Maureen Murphy
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[6] (...continued)
1991) was never issued in final form.

[7] 66 *Fed. Reg.* 666847.

[8] Pub. L. 100-497, 102 Stat. 2467, 25 U.S.C. §§ 2701 et seq.

[9] 25 U.S.C. § 2710(d)(8)(A).

[10] 25 U.S.C. § 2710(d)(8)(B). SOI may disapprove a compact only if it violates IGRA, another provision of Federal law, or "the trust obligation of the United States to Indians."

[11] 25 U.S.C. § 2701(d)(8)(C).

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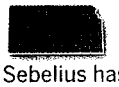
Reservations Not Required

The best casino sites on Indian reservations have been taken, and some tribes are looking elsewhere for new markets. States around the country are debating proposals for off-reservation gambling, in addition to the expansion of existing casinos. Here are some of the proposals:

OREGON

Gov. Theodore R. Kulongoski has signed a deal with the Confederated Tribes of the Warm Springs Reservation to build a casino in the Columbia River Gorge, with the state getting a share of the revenue. The tribe would close a smaller casino in central Oregon. The federal government now must approve the site. The local congressman, Greg Walden, supports the plan. Meanwhile, across the river in Washington, just north of Portland, the Cowlitz Tribe wants to build a casino with the backing of the Mohegans of Connecticut.



KANSAS

Gov. Kathleen Sebelius has an agreement with two tribes — the Kickapoo and the Sac and Fox — to build a casino in the Kansas City area. Legislators also have been looking at other proposals for expanding gambling in the state, and there are reports of other plans for Indian casinos in the works. A court ruling on the state's education funding, expected soon, could leave Kansans scrambling to find more money for schools — and gambling could be the most attractive option.

MINNESOTA

Gov. Tim Pawlenty has proposed a casino in Minneapolis-St. Paul and is talking with the White Earth Band of the Chippewa Indians and a non-tribal operator about running it jointly. Gambling is already big business in Minnesota. But Pawlenty is having trouble selling his new casino idea to the legislature. Competing tribes also object to the deal. For now, anyway, his prospects are uncertain.

FLORIDA

In March, voters in Broward County, north of Miami, voted to allow slot machines at places with parimutuel betting, such as racetracks. The vote also could be an opening for two tribes — the Seminole and the Miccosukee — to get into Las Vegas-style slots, since the Supreme Court has said tribes are entitled to any kind of gambling allowed in a state. The tribes are pressing for talks with Gov. Jeb Bush. Meanwhile, the state legislature has been fighting over how to regulate and tax machines in Broward.

CALIFORNIA

A deal for one tribe to build a huge casino in the Bay Area might fall flat, but Gov. Arnold Schwarzenegger has struck revenue-sharing agreements with 10 tribes since he took office, allowing them to start or expand casinos. He is in talks now with a number of others.

ILLINOIS

The Ho-Chunk Nation of Wisconsin wants to open a casino in the Village of Lynwood, on Chicago's south side. The tribe has the backing of the town board as well as officials from some neighboring communities. Local Rep. Jesse L. Jackson Jr. is lobbying for it and says local and state governments could expect a share of the revenue. A congressman from an adjoining district, Jerry Weller, is fighting it.

NEW YORK

In 2001, to boost revenue and tourism, the legislature approved six new casinos. One tribe has opened two in western New York and is building a third. Gov. George E. Pataki now wants to let five tribes put casinos in the Catskills. The deal would settle tribal land claims. A Supreme Court ruling in a separate New York case has forced him to rework four of the deals, which would have let the tribes buy thousands of acres of land. The court rejected the Oneida Nation's effort to unilaterally declare sovereign authority over newly purchased land and avoid local taxes and regulations, saying the tribe has to go through the Bureau of Indian Affairs.

OHIO

A number of mayors, state lawmakers and others have been discussing ways to bring gambling to Ohio. Some have been negotiating with the Eastern Shawnee of Oklahoma, which claims historic ties to the state. The mayor of one town testified before Congress recently, saying that a tribal casino complex would bring new jobs and money to an area hard hit by the loss of manufacturing jobs. , However, Gov. Bob Taft has said he opposes gambling.